VARIA AND ANOTHER v. PUBLIC PROSECUTOR.

[Appellate Criminal Jurisdiction (Pretheroe, J.) September 3, 1947]

Penal Code, Section 411 — Dishonestly retaining stolen property — Proof of possession essential.

In this case the two appellants were convicted of dishonestly retaining flour knowing the same to be stolen property contrary to section 411 of the Penal Code. The two appellants were found on the deck of a tongkang in which the Police found 13 bags of flour in circumstances which indicated that they were intended to be concealed. Both appellants were members of the crew of the tongkang and it was proved that it was customary, when the tongkang was in the river unladen, for members of the crew to sleep ashore at their respective homes.

Held, that in order to support a conviction under section 411 of the Penal Code proof of possession is essential and as there was no such proof in this case the convictions must be quashed.

CRIMINAL APPEAL.

D. S. Marshall for the Appellants.

J. C. N. Kilner (Crown Counsel) for the Respondent.

Pretheroe, J. : — The two appellants were convicted of dishonestly retaining 1,366 katties of flour knowing the same to be stolen property contrary to section 411 of the Penal Code. Each appellant was sentenced to three months rigorous imprisonment and the flour was ordered to be confiscated. Each appellant appealed against both his conviction and sentence.

Briefly stated the facts were as follows :— At 9 p.m. on the 11th April last a detective on duty at the waterfront observed two Indians throwing a bag of flour into the river from tongkong No. 6339. The detective boarded the tongkang and the two Indians fled by jumping from tongkang to tongkang. Another constable gave chase but the Indians escaped and neither the detective nor the constable could identify either of the Indians. Shortly after this O.C.P.D. Malacca accompanied by some members of the Police Force boarded tongkang 6338. There they found the two appellants lying on the deck and search of that tongkang revealed 13 bags of flour in circumstances which indicated that they were intended to be concealed. No person other than the two appellants was aboard the tongkang at the time the Police arrived. Both appellant are members of the crew of that tongkang and, when the tongkang is in the river unladen, it was proved that it is customary for the members of the crew to sleep ashore at their respective homes.

As I have taken a certain view of this appeal it is only necessary for me to consider the second ground of appeal viz. that there was no proof that the appellants were in possession of the flour. As in normal circumstances members of the crew of a vessel do not have possession of any cargo in that vessel it was clearly necessary to prove that the circumstances in this case were not normal and that the two appellants had in fact possession of the flour. It was stated by the head Indian of the tongkang that there was no reason why members of the crew should not sleep on the tongkang if they so desired so the mere presence of the appellants that night was unusual but not unauthorised. There is no evidence whatever to show that the appellants are the same persons as the Indians the detective saw throwing a bag of flour into the river and I can find no evidence to indicate that the appellants were in any way connected with the flour in tongkang No. 6338. The presence of the appellants on that tongkang that night was highly suspicious but in order to support a conviction under the section charged proof of possession is essential. That proof being lacking I allow both appeals and quash both convictions.

As the appellants disclaimed any interest in the flour the order regarding the forfeiture of the flour is confirmed and the Magistrate will make the necessary order under section 441 (2).

Appeal Allowed.

HOH KEH PENG v. PUBLIC PROSECUTOR.

[Appellate Criminal Jurisdiction (Willan, C.J., Malayan Union, Jobling & Spenser Wilkinson, J.J.) July 22, 1947]

Penal Code, Section 473 — Possession of counterfeit seal with intent to commit forgery — Onus on prosecution of proving intention — Mere possession does not constitute the offence — Procedure at close of prosecution case — Criminal Procedure Code S. 180.

In this case the appellant had been convicted under Section 483 of the Penal Code with being in possession of a counterfeit seal with the intention of using it for the purpose of committing forgery. The facts were that a rubber stamp being a close imitation of the rubber stamps used by the Assistant Food Controller, Perak, when signing certain documents, was found in accused's basket in a room in the Central Hotel at Ipoh. The appellant appealed to the Court of Appeal against his conviction.

Held, that the onus is on the prosecution to prove the intention to use the seal for the purposes of forgery and that it is not sufficient for them to prove mere possession of the seal without any proof of such intention.

Cases referred to :—

(1) *Queen v. Kisto Soonder Deb* 2 W.R. (Cr.) 5.

(2) *Queen v. Goluck Chunder and another* 13 W.R. (Cr.) 16.

CRIMINAL APPEAL.

M. S. Mahendran for the appellant.

M. G. Neal (Crown Counsel) for the Respondent.

The Judgment of the Court of Appeal was delivered by

Spenser-Wilkinson, J. : — In this case the accused was charged, under section 473 of the Penal Code, with being in possession of a counterfeit seal with the intention of using it for the purpose committing forgery. The facts were that a rubber stamp being a close imitation of the rubber stamps used by the Assistant Food Controller, Perak, when signing certain documents was found in accused's basket in a room in the Central Hotel at Ipoh.

It seems to us that the learned trial Judge has misdirected himself on the law applicable to this case. In his grounds of judgment he states :—

> It seems clear from **Ratanlal's** commentary on it that where a counterfeit seal is found in the accused's possession and he cannot give satisfactory information as to how he came to possess it, the Court may infer that he is keeping it with the intention of using it fraudulently.

We do not think that the text of *Ratanlal*, still less the authorities there cited, support this view. We can find no case in which the mere possession of one seal without more has been held to be proof of intention to use it for the purposes of forgery. Two cases are cited by *Ratanlal* on the Law of Crimes. In the first case (*Queen v. Kisto Soonder Deb.*[1]) the accused had in his possession a forged document, the counterfeit impressions of various seals and sundry tools for manufacturing the same, and it was further proved that the only way in which these things could have got into accused's room was by a door which was padlocked by accused. In the other case (*Queen v. Goluck Chunder and another*[2]) the accused had a collection of some nine seals imitating various official seals and various papers on some of which the writing was partially or entirely erased.

It appears to us that in each of these cases there was circumstantial evidence sufficient to prove intention independently of what the accused's explanation may have been.

Turning now to *Gour's* Penal Law of British India (5th Ed.) under section 473 the author comments (p. 1605) that the question of intention and knowledge must be answered here in the same sense as in section 256 and refers back to paragraphs 2711 to 2712. In paragraph 2711 (page 836) the following passage occurs :—

> In each case, the mere possession of tools is not an offence, unless possession was (a) for the purpose of being used for counterfeiting or (b) knowing or having reason to believe that it was intended to be so used.

He then compares section 256 with the English Post Office Act which prohibits a person from having in his possession any die, plate, etc. for making a fictitious stamp "unless he shows a lawful excuse". This offence is substantially reproduced in India in section 263A of the Penal Code and in the Federated Malay States law in section 85 (i) (b) of the Post Office Enactment (Cap. 162). This last provision seems to throw the onus of proof upon the accused, once possession has been proved, of proving a lawful excuse.

Section 473 of the Code, far from placing any such burden upon the accused, requires the prosecution to prove that accused had possession "intending that the same shall be used for the purposes of any forgery which would be punishable under any section of this Chapter other than section 467". These are very strong words — stronger, as it seems to us, than the words of section 256 which includes "having reason to believe".

It appears to us to be an entirely wrong approach to the subject to discuss whether or not the accused is able to explain his possession and in this respect we consider the language of the head-note and judgment in *Queen v. Kisto Soonder Deb* is unfortunate as is also the comment in *Ratanlal* thereon. Unless at the close of the case for the prosecution the offence has been made out, there is no justification for calling upon the accused for any explanation whatever. There is a positive duty upon the Judge under section 180 of the Criminal Procedure Code to acquit the accused at the close of the prosecution if he is not prepared then and there to convict without hearing more. If an accused person is called upon for his defence he may be able to turn the balance in his favour; but he should never be called upon for his defence in a case of doubt so that he may convict himself by supplementing a weak prosecution case.

In this case, even accepting the evidence that accused admitted possession, it seems to us that the prosecution have proved nothing beyond possession — there are no other circumstances such as possessing documents or impressions or other counterfeit instruments which together can be said to be *proof* of intention. Suspicion is not proof, and no burden is placed by law on the accused under this section as it is in the case of the possession of stolen goods by reason of section 114 illustration (a). To convict upon mere possession alone would in our opinion amount not only to ignoring the words of the section but also to convicting the accused of an offence analogous to that

under the Post Office Enactment — an offence which does not exist in our law.

In view of what has been said in the preceding paragraph it is unnecessary for us to express any view as to the admissibility or otherwise of the statements made by the accused to the Police Inspector when the rubber stamp was found in his bag. The conviction must be quashed on the ground that the prosecution failed to prove the offence charged.

The appeal is allowed.

Appeal Allowed.

CHIA CHIN SEN v. PUBLIC PROSECUTOR.

[Appellate Criminal Jurisdiction (Bostock Hill, J.)
August 23, 1947]

Excise Enactment, Johore, Section 9 (i) — Possession of a still or other apparatus for distilling or manufacturing intoxicating liquor — What constitutes.

In this case the appellant was charged under Section 9 (i) of the Excise Enactment, Johore, with knowingly having in his possession apparatus for the manufacture of intoxicating liquor and was convicted and fined $100/-. The Appellant was a tin-smith and on the 8th of May 1947 there was found-in his shop three pieces of apparatus such as are used in a still for manufacturing samsu. Evidence was also given that these three pieces of apparatus called respectively a condenser, a pipe and a salor (or spout) would require a pan or boiler to constitute a complete still.

Held, (1) that where some important part of the complete still or other apparatus is missing, it is essential that there should be evidence that the apparatus found had been used for distilling or manufacturing intoxicating liquor or that the possessor definitely knew that it was so used; (2) that in the absence of such evidence in this case, there was reasonable doubt, and that the accused must be given the benefit of it.

Case referred to :—

(1) *P. P. v. Manickam* (1940) 9 M.L.J. 133.

CRIMINAL APPEAL.

J. L. R. Pillai for the Appellant.

W. M. McCall for the Respondent.

Bostock Hill, J. : — In this case the Appellant was charged under section 9 (i) of the Excise Enactment (No. 102) with knowingly having in his possession apparatus for the manufacture of intoxicating liquor and was convicted and fined $100.00.

Appellant was a tin-smith and on 8.5.47 there were found in his shop three pieces of apparatus such as are used in a still for manufacturing samsu. Evidence was also given that these three pieces of apparatus, called respectively a condenser, a pipe and a salor (or spout), would require a pan or boiler to constitute a complete still,

Appellant gave evidence that a Chinese, name unknown, had on 30.4.47 come to his shop and told him to make "a tin drum 3 ft. high and 16 inches in diameter with a hole to be bored 6 inches from the top, a pipe to go into the hole, pipe over a foot long, with a salor on the outside below the pipe". He stated that he did not know for what purpose they were to be used. He also stated that he had never made such a drum before and did not ask the man who ordered these things what he wanted to do with the drum.

Mr. Pillai for the Appellant contended that the three pieces of apparatus found did not constitute a still. Mr. McCall, for the Respondent, was inclined to agree that they did not constitute a still, but argued that they were "apparatus for distilling or manufacturing intoxicating liquor". He argued that the words "or other apparatus" in section 9 of the Excise Enactment were meant to cover component parts of a still; otherwise they were meaningless.

The only case that offers any guidance on the point is *P. P. v. Manickam*[1]. This was argued before the Court of Criminal Appeal and the judgment of McElwaine, C. J. (S.S.) is of assistance. The learned Chief Justice stated that whether or not a person who has in his possession the dismantled components of a still, has a still in his possession is entirely a question of fact. In that case *all* the components of a still were found on the premises and some of them were concealed. There was also evidence of their past use together as a still and the accused's explanation as to his possession of them was very weak.

In the present case, perhaps the most important constituent of a still, the pan or boiler, was not there and there was no evidence that the apparatus that was found had been used as a still. In fact it definitely had not, as it was quite new. The learned Magistrate, however, stated in his grounds of judgment that he was unable to believe that the Appellant did not know that the articles were used for samsu-making.

The first point to consider is whether the three pieces of apparatus found constitute "a still or other apparatus for distilling or manufacturing intoxicating liquor". I incline to the opinion that primarily the Enactment refers to a complete still and that the words "or other apparatus for distilling or manufacturing intoxicating liquor" must be construed *ejusdem generis* with the word "still" which connotes a complete apparatus. In any case, I am of opinion that if some important part of the complete "still" or "other apparatus" be missing, then it is essential that there should be evidence that the apparatus found had been used for distilling or manufacturing intoxicating liquor,